IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1024 OF 2003,

APPEAL FROM ORDER NO.1025 OF 2003,

APPEAL FROM ORDER NO.1026 OF 2003,

APPEAL FROM ORDER NO.1027 OF 2003

APPEAL FROM ORDER NO.1028 OF 2003

APPEAL FROM ORDER NO.1029 OF 2003,
AND
APPEAL FROM ORDER NO.1030 OF 2003.

A.O.NO.1024/03.

1. Municipal Corporation of Greater Mumbai a Body Corporate constituted under the provisions of the Bombay Municipal Corporation Act, 1888, having its Office at Mahapalika Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner, "A" Ward Municipal LOffice, 134-E, Shahid Bhagat Singh Road, Fort, Mumbai 400 001. ... Appellants (Org.Defendants Nos.1 & 2.)

Versus.

1. Mohd.Hajif A.Hamid, Shop No.81.

2. Mohd.Shafi A.Gani, Shop No.82.

3. Kausar Yunus, Shop No.83

4. Rubina Yunus, Shop No.84.

5. Rubina Yunus, Shop No.85.

6. Tasnee Yunus,
   Shop No.86,

7. Noor Mohd.Yusuf,
   Shop No.87,

8. Farhan Yusuf,
   Shop No.88.

9. Asif M.Shafi,
   Shop No.89,

10. Mohammed Siddique.
    Shop No.90.

11. Mohd.Akram Noor Mohd.
    Shop No.92,

12. Shirin Mohd. Yusuf.
    Shop No.93.

13. Mohd.Ahmed Makki.
    Shop No.94.

14. Kausar Yunus,
    Shop No.95,

15. Mohd.Asif Mohd.Shafi,
    Shop No.96,

16. Cutleriwalla A.Rashid,
    Shop No.97

    All of Mumbai, Indian
    Inhabitants having their
    respective shops at Sara
    Corner, 16, Global Compound,
    Saboo Siddiqui Road, Near
    Manish Market, Mumbai 400 001.

17. Global Marketing,
    a Partnership firm carrying on
    business at Global House, 1st
    floor, Room No.2, 16, Moonim
    Compound, Saboo Siddiqui Road,
    Mumbai 400 001.

18. The Court Receiver,
appointed as Receiver of the
suit property in MCOC Special
Case No.3 of 2003 having his
office at Azad Maidan Police
Station, Mumbai 400 001.

... Respondents.
(Nos.1 to 16-Org.
Plaintiffs and
Nos.17 & 18-Org.
Defendants 3 & 4.)

A.O.NO.1025/03.

1. Municipal Corporation of Greater
Mumbai a Body Corporate constituted
under the provisions of the Bombay
Municipal Corporation Act, 1888,
having its Office at Mahapalika
Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner,
"A" Ward Municipal LOffice,
134-E, Shahid Bhagat Singh Road,
Fort, Mumbai 400 001.

... Appellants
(Org.Defendants
Nos.1 & 2.)

Versus.

1. Seema Arshad Zahher,
Shop No.100

2. Ilyas Nathani,
Shop No.101/102,

3. Modi Bhaskar Jayantilal,
Shop No.103.

4. Sabira Ibrahim Merchant,
Shop No.104.

5. Bilal Akhtar Shaikh,
Shop No.105,

6. Mariyam Abdyul Aziz,
   Shop No.106.

7. Asad Nazir Seila,
   Shop No.107,

8. Owais Nazir Seila,
   Shop No.108.

9. Syed Asif Hasmatali.
   Shop No.109.

10. Tasneem Husain,
    Shop No.110.

11. Khatija Mushtaq Reshamwala
    Shop No.111.

12. Haji Usmanwali Mohammed
    Shop No.112,

13. Sajid Shafi Navsariwala,
    Shop No.113.

14. Sharifa Mohammed
    Shop No.114.

15. Fuaad Patka
    Shop No.115.

16. Rabia Barkat
    Shop No.116.

17. Aslam Malkani,
    Shop No.117.

18. Qureshi Zakir Ali
    Shop No.118.

19. Atique Mia Ahmed.
    Shop No.119.

20. Khatiza Bai Abdul Aziz,
    Shop No.120.

21. Hoorbanu M.Y.Motiwala.
    Shop No.121,

22. Sayeeda H. Pitodia

Shop No.122,

23. Asif Bhai Hussein Munna Miya,
Shop No.123.

24. Fazal Abbad,
Shop No.124,

25. Ismail Shakoor Zaveri,
Shop No.125.

26. Salim Nagani.
Shop No.126.

27. Zubaida A.Kadar,
Shop No.127.

28. Haji Abdul Razzak,
Shop No.128.

29. Roshan A.R.A.
Shop No.129.

30. Sajid Shafi Navsariwala
Shop No.130.

31. Ayaz A.J.Ahmed,
Shop No.131.

32. Rabia Ahmed Ghojariya,
Shop No.132.

All of Mumbai, Indian Inhabitants, having their respective shops at Sara Corner, 16, Global Compound, Saboo Siddique Road, Near Manish Market, Mumbai 400 001.

33. Global Market,
a partnership firm, carrying on business at Global House, 1st floor, Room Noa.2, 16, Moonuim Compound, Saboo Siddiqui Road, Mumbai 400 001.

34. The Court Receiver,
appointed as Receiver of the

Suit property in MCOC Special Case No.3 of 2003 having his office at Azae Maidan Police Station, Mumbai 400 001. ... Respondents (Nos.1 to 32-Org. Plaintiffs & Nos. 33 & 34-Org.Defts Nos.3 and 4.)

A.O.NO.1026/03.

1. Municipal Corporation of Greater Mumbai a Body Corporate constituted under the provisions of the Bombay Municipal Corporation Act, 1888, having its Office at Mahapalika Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner, "A" Ward Municipal LOffice, 134-E, Shahid Bhagat Singh Road, Fort, Mumbai 400 001. ... Appellants. (Org.Defendants Nos.1 & 2.)

Versus.

1. Smt.Fatimabi Abdul Rehman Shaikh, of Mumbai, Indian Inhabitant, carrying on business at Shops Nos.2, 6 to 8, 16, Globa, Compound, Saboo Siddique Road, Near Manish Market, Mumbai 400001.

2. Global Marketing, a partnership firm, carrying on business at Global House, 1st floor, room No.2, 16, Moonim Compound, Saboo Siddiqui Road, Mumbai 400 001.

3. The Court Receiver, appointed as Receiver of the suit property in MCOC Special Case No.3 ofg 2003 having his office at Azad Maidan Police Station, mumbai 400 001. ... Respondents (No.1-Org.Plaintiff & Nos.2 & 3 - Org. Defts.3 & 4.)

A.O.NO.1027/03.

1. Municipal Corporation of Greater Mumbai a Body Corporate constituted under the provisions of the Bombay Municipal Corporation Act, 1888, having its Office at Mahapalika Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner, "A" Ward Municipal LOffice, 134-E, Shahid Bhagat Singh Road, Fort, Mumbai 400 001. ... Appellants (Org.Defendants Nos.1 & 2.)

Versus.

1. Dawood Vadia Hussain, Shop No.292,

2. Mohd. Arif, Shop No.293,

3. Moosa Suleman Koradia Shop No.294.

4. Asma Mohd. Yusuf, Shop No.296.

5. Noor Mohd. Shop No.297A.

6. Furqan Rashid, Shop No.297B,

7. Mohd.Shafi Abdul Gani Shop No.297C.

8. Sharifa Mohammed Shop No.297D,

All of Mumbai, Indian Inhabitants having their respective shops at Sara Corner, 16, Global Compound, Saboo Siddique Road, Near Manish Market, Mumbai 400001.

9. Global Marketing, a partnership firm carrying on business at Global House, 1st floor, Room No.2, 16, Moonim Compound, Saboo Siddique Road, Mumbai 400 001.

10. The Court Receiver appointed as Receiver of the suit property in MCOC Special Case No.3 of 2003 having his office at Azad Maidan Police Station, Station, Mumbai 400 001. ... Respondents (Nos.1 to 8 - Org. Plffs.& Nos.9 & 10- Org.Defts.3 & 4.)

A.O.NO.1028/03.

1. Municipal Corporation of Greater Mumbai a Body Corporate constituted under the provisions of the Bombay Municipal Corporation Act, 1888, having its Office at Mahapalika Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner, "A" Ward Municipal LOffice, 134-E, Shahid Bhagat Singh Road, Fort, Mumbai 400 001. ... Appellants (Org.Defendants Nos.1 & 2.)

Versus.

1. Mohd. Rizwan Taibani, Shop No.257.

2. Salim Abubaker Shaikh, Shop No.258.

3. Salim Mustafa Shaikh, Shop No.259.

4. Ebrahim A.R.Shaikh, Shop No.260.

5. Ayesha Allah Baksh Shop No.261,

6. Maaz Ahmed Zamzam Shop No.262.

7. Zarina Mohd. Lokhandwala
   Shop No.263.

8. A.G.Shaikh.
   Shop No.264/267.

9. A.Gafoor Shaikh,
   Shop No.265.

10. Farida Begum,
    Shop No.266.

11. Mohd.Kasifm Yusuf,
    Shop No.268.

12. Daulat Fakir Mohd.
    Shop No.269.

13. Hanif H.Lokhandwala.
    Shop No.270.

14. Arif Shaikh
    Shop No.271 & 274

15. Fardan Fuad Patka
    Shop No.273.

16. Shabir Shaikh.
    Shop No.275.

17. Mustafa Karim.
    Shop No.276.

18. Amina Aboobacker
    Shop No.277.

19. Yusuf Navsariwala,
    Shop No.278.

20. Zohra Dawood Wadia,
    Shop No.279.

21. Bilal Akhtar Shaikh
    Shop No.280.

22. Faizuddin Ahmed
    Shop No. 281.

23. Amin A. Kader.
    Shop No. 282.

24. Hajra Begum
    Shop No. 283.

25. Mohd. Yunus
    Shop No. 284.

26. Sajid Mohd. Shafi.
    Shop No. 285.

27. Abdul Rashid.
    Shop No. 286.

28. Abdulla Yusuf,
    Shop No.287.

29. Mohd. Yusuf Mohd.Yunus.
    Shop No.288.

30. Mohd. Ebrahim.
    Shop No.289.

31. Mohd.Moin Sakhawat Mansuri
    Shop No.290.

32. Pankaj S.thakkar
    Shop No.291.

    All of Mumbai, Indian
    Inhabitants, having their
    respective shops at Sara
    Corner, 16, Global Compound,
    Saboo Siddiqui road, Near
    Manish Market, Mumbai 400001.

33. Global Marketing,
    a partnership firm, carrying
    on business at Global House,
    1st floor, Room No.2, 16,
    Moonim Compound, Saboo Siddiqui
    Road, Mumbai 400 001.

34. The Court Receiver,
appointed as Receiver of the
suit property in MCOC Special
Case No.3 of 2003 having his
office at Azad Maidan Police
Station, Mumbai 400 001. .... Respondents
(Nos.1 to 32-Org.
Plaintiffs & Nos.
33 & 34-Org.
Defts.3 & 4.)

A.O.No.1029/03.

1. Municipal Corporation of Greater
Mumbai a Body Corporate constituted
under the provisions of the Bombay
Municipal Corporation Act, 1888,
having its Office at Mahapalika
Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner,
"A" Ward Municipal LOffice,
134-E, Shahid Bhagat Singh Road, ... Appellants
Fort, Mumbai 400 001. (Org.Defendants
Nos.1 & 2.)

Versus.

1. M.Yusus M.Ali.
Shop No.133.

2. Hamida Mahmood Masania
Shop No.134.

3. Abida Bashir
Shop No.135.

4. M.Yusuf Mohd.Habib.
Shop No.136.

5. Mohd.Sohail Iqbal Nagani
Shop No.137.

6. Zaibunnisa A,Rashid
Shop No.138.

7. Avesh Hanif Pitodia
   Shop No.139.

8. Nadeem Patodia
   Shop No.140.

9. Irfan Yunus
   Shop No.141.

10. Hanif HAn Pirosi
    Shop No.142.

11. Ayaz A.J.Ahmed.
    Shop No.143.

12. Sadaf Aslam
    Shop No.144.

13. Farheen Arif,
    Shop No.145.

14. Yasmeen A.Razak
    Shop No.146.

15. Raif Qhmed Ismail
    Shop No.147.

16. Amin A.Kader.
    Shop No.148.

17. Naheed Abdulla Navsariwala
    Shop No.149.

18. Fazal Khan,
    Shop No.150.

19. Sajida Majid Reshamwala
    Shop No.151.

20. Sayed Altaf
    Shop No.152.

21. A.Kader
    Shop No.153.

22. Mohd.Shafi Habib

Shop No.154.

23. Ayesha Rashid Cutlerywala
Shop No.155.

24. Imran Yunus
Shop No.156.

25. Hamida A.Sattar
Shop No.157.

26. Saira Salim Khan
Shop No.158.

27. Mohd. Sohail Kagzi,
Shop No.159.

28. Sanjeev Keshav,
Shop No.160.

29. Abdul Basit
Shop No.161.

30. Irfan A.Gani Bawa
Shop No.162.

31. Bashir Abdul Samad
Shop No.163.

32. Abdul Aziz
Shop No.164.

33. Bashir A.Samad
Shop No.166.

34. Arifa A.Shaikh
Shop No.167.

35. Fajeriya Sayed Ahmed
Shop No.168.

36. Arfunnisa A.Quddus
Shop No.169.

37. Aasiya A.Wahid,
Shop No.170.

38. Mohd.Yusuf Millwala,

Shop No.171.

39. Shabbir Shaikh
Shop No.172.

40. Aisiya Asif,
Shop No.173.

41. Hanifa Yunus
Shop No.174.

42. Ajmal Ansari,
Shop No.175.

43. Global Marketing, a partnership firm, carrying on business at Global House, 1st floor, Room No.2, 16, Moonim Compound, Saboo Siddiqui Road, Mumbai 400 001.

44. The Court Receiver, appointed as Court Receiver of the suit property in MCOC Spl.Case No.3 of 2003,having his office at Azad Maidan Police Station, Mumbai 400 001. ... Respondents (Nos.1 to 42 - Org. Plaintiffs and Nos. 43 & 44 - Org. Defts.Nos.3 & 4.)

A.O.NO.1030/03.

1. Municipal Corporation of Greater Mumbai a Body Corporate constituted under the provisions of the Bombay Municipal Corporation Act, 1888, having its Office at Mahapalika Marg, Mumbai 400 001.

2. Assistant Municipal Commissioner, "A" Ward Municipal LOffice, 134-E, Shahid Bhagat Singh Road, Fort, Mumbai 400 001. ... Appellants (Org.Defendants Nos.1 & 2.)

versus.

1. Asma Mohd. Rafique.
Shop No.298A

2. Asif Suleman
   Shop No.198B.

3. Mohd.Yusuf Noor Mohd.
   Shop No.299.

4. Shabir Shaikh,
   Shop No.299A.

5. Arif Fuzul Rehman
   Shop No.299B

6. Farzama A.Kader
   Shop No.299C.

7. Amin A.Kader
   Shop No.299D.

8. Mohd.Bilal Shaikh,
   Shop No.299E.

9. Ayesha Shaikh,
   Shop no.299F,

10. Abdul Kader A.Gani
    Shop No.378.

11. Sahin Mohd. Shafi
    Shop No.379.

    All of Mumbai, Indian
    Inhabitants having their
    respective shops in Sara
    Corner, 16, Global Compound,
    Saboo Siddiqui Road, Near
    Manish Market, Mumbai 400 001.

12. Global Marketing,
    a Partnership firm, carrying
    on business at Global House,
    1st floor, Room No.2, 16,
    Moonim Compound, Saboo Siddiqui
    Road, Mumbai 400 001.

13. The Court Receiver,
    appointed as Receiver of the

Suit property in MCOC Special Case No.3 of 2003 having office at Azad Maidan Police Station, Mumbai 400 001.	... Respondents (Nos.1 to 11-Org. Plaintiffs & Nos. 12 & 13 - Org. Deft.Nos.3 & 4)

Shri K.K.Singhvi, Senior Counsel with Shri N.V.Walawalkar and Ms.Geeta Joglekar for the Appellants in all the Appeals.

Shri E.P.Bharucha, Senior Counsel i/by M/s.S.K. Srivastava & Co. for the Respondents in A.O.No.1024 of 2003.

Shri P.K.Dhakephalkar i/by M/s.S.K.Srivastava & Co. for the Respondents in A.O.Nos.1025/03 to 1030/03.

CORAM : ABHAY S. OKA, JJ.

DATED : 21st & 22nd FEBRUARY, 2004.

ORAL JUDGMENT.

1. All these Appeals arise out of a common Judgment and Order dated 25th November 2003 passed by the learned trial Judge. Therefore, these Appeals can be disposed of by a common Judgment.

2. The order impugned has been passed by which the Notices of Motion for temporary injunction taken out by the Respondents/Plaintiffs have been allowed. The subject matter of all the suits are shops/galas in which the Respondents are carrying on their business. The said shops/galas are situated in South Bombay in an area predominently used for commercial and business

activities. The challenge in all the suits is to the notice issued under the section 351 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the said Act of 1888") by the Appellants and the orders passed by the Appellant No.2 on the basis of the said Notices. The Appellant No.2 is the Assistant Municipal Commissioner who has passed the order of demolition of the suit premises on the ground that the construction thereof is unauthorised.

3. I have heard submissions of Shri K.K.Singhvi, learned Senior Counsel appearing for the Appellants. I have also heard Shri Bharucha, learned Senior Counsel appearing for the Respondents in Appeal No.1024 of 2003 and Shri Dhakephalkar, learned Counsel appearing for the Respondents in rest of the Appeals.

4. Before I refer to the facts of each individual case, it will be necessary to record the submissions made by the learned Counsel appearing for both the parties. Shri Singhvi, learned Senior Counsel appearing for the Appellants has taken me through the impugned Judgment and Order. His first submission was that the trial Court has not considered each and every document produced by the Respondents/Plaintiffs. He has taken me

through the various documents produced by the Respondents/ Plaintiffs. He pointed out that the case of the Respondents/Plaintiffs was that there were 7 old structures on land bearing Cedestral Survey No.14/1504 of the Fort Division bearing Plot Nos.7 to 10 and the said structures were assessed from the year 1961-62 to the Municipal tax. He pointed out that the case of the Respondents was that the shop premises/stalls which are subject matter of the suits are created by carrying out internal renovation to the old existing structures. He, however, submitted that there is no material on record to show that these structures in respect of which action is sought to be taken by the Appellants can be co-related to the old existing structures which were in existence since 1961-62. He submitted that in case of some of the old structures action under section 351 of the said Act of 1888 was initiated in the year 1991 and a suit was filed for challenging the order passed the Corporation by the person allegedly holding the said structure. He pointed out that the said suit has been dismissed. He submitted that even for establishing prima facie case, the Respondents/Plaintiffs should have produced documentary evidence to prima facie show that the said shops/galas are only part of the old structures which were in existence prior to the year 1962. He

submitted that in some cases there are documents showing that the suit structures were erected after 1993. He submitted that merely by showing existence of some old structures in the year 1961-62 on larger property the Respondents cannot establish prima facie case unless some material is produced on record to connect the existing structures with the old structures which were in existence in the year 1961-62.

5. Shri Singhvi further submitted that the orders passed by the Assistant Municipal Commissioner were in the nature of quasi-judicial orders and therefore, without examining the merits of each case by referring to the documents on record, the learned trial Judge should not have restrained the Appellants from implementing and executing the orders of demolition. He submitted that as the documents produced by the Plaintiffs are not specifically considered by the learned trial Judge, it was necessary to interfere with the discretionary order of temporary injunction passed by the trial Court. He has made submissions with reference to certain specific documents on record. I propose to deal with the said submissions specifically while dealing with each and every individual case.

6. Shri Bharucha the learned Senior Counsel appearing for the Respondents in Appeal from Order No.1024 of 2003 pointed out that the present Appeals are under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908, and the Appeals being against the discretionary order passed by the learned trial Judge, this Court should be slow to interfere with the discretion exercised by the trial Court. He relied upon the Judgment of the Apex Court reported in (1990) (Supp) SCC page 727 (Wander Ltd. and Another v/s. Antox India P.Ltd.) He relied upon the following observations of the Apex Court:

> "14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek

> to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The Appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial tage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

Shri Bharucha submitted that there is a finding recorded by the learned trial Judge that there existed triable issues for which evidence was required to be led. He submitted that the trial Court has recorded a finding that at least in the year 1961 the suit structures were in existence and if the documents produced on record are considered, prima-facie case was made out. He submitted that there is a voluminous documentary evidence on record starting from the year 1961-62 and the issue

relating to the legality of the suit structures can only be decided after an opportunity is given to the Respondents to lead evidence. He has taken me through the assessment records of the Appellant No.1-Corporation. He has also pointed out the earlier notice issued under section 351 of the said Act of 1888 and by comparing the sketch annexed to the said notice with a map produced by the Respondents he submitted that prima-facie it is clear that in 1991 notices of demolition were issued by the Appellant No.1-Corporation and from the year 1991 no action was taken in respect of the suit structures. He submitted that when no action was taken for such a long time, the learned trial Judge was right in granting interim protection. He urged that this is a case in which evidence will have to be led on various triable issues. He submitted that the learned trial Judge has passed a discretionary order on examination of all the documents before him and no interference is required with the said discretionary order.

7. Shri Dhakephalkar the learned Counsel appearing for the Respondents in the other appeals while replying to the submissions made by Shri Singhvi has taken me through the orders passed by the Appellant No.2 under

section 351 of the said Act of 1888. He submitted that the orders passed by the Appellant No.2 show non-application of mind. He also submitted that the stand taken in the affidavits-in-reply filed by the Appellants is inconsistent with what is held in the orders passed by the Appellant no.2. He submitted that there is no finding recorded by the Appellant No.2 that the suit structures have been re-erected after demolition of the old structures. He submitted that the only conclusion recorded by the Appellant No.2 was that existence of the suit structure on the datum line (i.e. the date fixed by the Appellant No.1 for tolerating unauthorised structures) was not established and that the structures are unauthorised. Shri Dhakephalkar submitted that the Respondents have taken their respective premises from one M/s.Global Marketing and they were not aware about the earlier notice issued in the year 1991. He submitted that the order of temporary injunction has been passed by the learned trial Judge on consideration of all the documents and as such the said order is operating from the year 2003 and no interference is called for as the suit filed by the Respondents can be heard expeditiously and that the issues involved in the suit can be gone into and decided only after the parties are allowed to produce their oral

and documentary evidence, and therefore no interference with the discretionary order passed by the learned trial Judge can be made at this stage and the appeals are liable to be dismissed.

8. The submissions made by the learned Counsel appearing for the parties will have to be considered in light of facts of each of the individual case. So far as the Appeal Nos.1024 to 1026 of 2003 are concerned, it is not in dispute that the facts are more or less identical and the documents relied upon by the parties are also the same. Therefore, I propose to deal with the said three Appeals together.

A.O.1024/03, 1025/03 & 1026/03.

9. It will be necessary to refer to the averments made in the reply given by the Respondents to the notice under section 351 of the said Act of 1888. As the facts in these three cases are identical, I am referring to the documents on record in Appeal No.1024 of 2003. The allegation in the Notice dated 13th May 2003 issued under section 351 is that there is an unauthorised construction of a (shed) structure with brick masonary walls and A.C.Sheet roofing ademasuring 11.30 m.x 6.60

m. and height of 3.10 m. and 3.50 m. at the southern side adjacent to Sara Shoppee in the plot known as Moonim Compound, Saboo Siddique Road, Mumbai 400 001. A detailed reply is given to the said notice by the Advocate for the Respondents. It is disclosed in the reply that the designated Court appointed under the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as MCOC Act) has passed an order on 19th May 2003 by which the property in dispute has been attached and the Senior Inspector of Police, Azad Maidan Police Station, Mumbai, has been appointed as the Receiver of the said larger property. It is submitted that without the permission of the Designated Court under MCOC Act action cannot be taken against the structures. The said reply is given on behalf of the 17 persons in which it is stated that they are the lawful tenants of the shop premises and they are inducted in the said premises by the Respondent no.17 i.e. M/s.Global Marketing a partnership firm. It is stated that Plot bearing C.S.No.14/1504 of Fort Division ealrier known as Plot No.XXXII and XXIIIA was owned by a company by name Abdullabhai Faizullabhai Private Ltd. and there were 7 structures on the said plot which are reflected in the city survey sheet prepared in the year 1969. A specific case is made out that the structure in

respect of which notice under reply was issued was in occupation of one Abdul Samad who was carrying on business in the name and style of M/s.A to Z Auto Garage from the said structure which was assessed by the Appellant No.1-Corporation for the purpose of levy of property tax under No.A-3357-58(1). It is contended that the shops in occupation of the Respondents in respect of which notice is issued are portions of the bigger structure of Abdul Samad. It is stated that two shopping centers by name Sara Shoppee and Sahara Shoppee are constructed on the plot bearing C.S.No.14/1504 and the said two shopping centers have been constructed recently. It is submitted that the Officers of the Appellant No.1 had visited the property when the said two shopping centers were under construction and they had not taken any objection to the suit structures. A reference is also made in the reply to the notice under section 351 bearing No.ABNII/9 dated 21st October 1991 issued to Abdul Samad. It is stated that the present notice has been issued in respect of the same structure. It is also pointed out that licences under section 394 of the said Act of 1888 was granted in respect of the said A to Z Auto Garage.

10. It will be necessary to refer to and averments made

in the plaint. In the plaint it is reiterated that the structure in respect of which the notice has been issued is a part of the said M/s.A to Z Auto Garage. Reliance is also placed on the assessment extract and it is alleged that the the suit structure was in existence much prior to the datum line (i.e. 1st April 1962). It is pointed out that the electricity supply was granted to M/s.A to Z Auto Garage. In the plaint there is also a reference to the order passed by the Designated Court under the MCOC Act. The said order records that the Appellant No.1 can take action only by following due process of law as laid down in the case of Sopan Maruti Thopte V/s. Pune Municipal Corporation, reported in AIR 1996 Bombay page 304. It is also pointed out that an action has been taken by the Appellant No.1-Corporation under section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 against a property known as Sahara Shoppe in the same compound and a suit has been filed for challenging the said notice.

11. The Appellants filed a reply to the Notice of Motion for temporary injunction. It is contended by the Appellants that as per the Survey sheet of the year 1957 and 1969 only two structures have been reflected on the said larger plot of land. It is stated that the

original shed housing A to Z Auto Garage has been removed and in its place a new structure has come up. It is specifically stated that the original garage and the adjoining servants quarters have been removed and a new structure has been erected without the permission of the Appellant No.1-Corporation. It is denied that the structure is in existence prior to the datum line i.e. prior to 1st April 1962. It is further submitted that the suit structure is unauthorised and is required to be demolished.

12. In the light of these factual averments made in the pleadings and the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the documents on record. The original Plaintiffs have produced an agreement dated 20th July 2002 executed by one M/s.Global Marketing in favour of one of the Plaintiffs in respect of the premises being cabin/unit No.97 admeasuring 5’.0" x 3’-5" having height of 7’-6’. There are no recitals in the said agreement to the effect that the said cabin/unit is part of an old structure. It is not stated in the agreement that there is any Municipal permission granted for construction of the said Cabin/unit. It is to be noted that though the original Plaintiffs are claiming themselves under the

said agreement executed by M/s.Global Marketing in the year 2002, it is not their case at all that before entering into the agreement they have made enquiries to ascertain whether the structure in question is authorised. A reference will have to be made to the assessment record of the year 1997-98 maintained by the Appellant No.1-Corporation for the purposes of property taxes. In the said record it is reflected that there is one detached shed as a garage along with a servants quarter. A letter issued by the Appellant No.1 to M/s.S.Raees & Associates in the year 1997 is on record. It discloses that an inspection extract of the year 1996-97 shows existence of one shed with a small shed in rear of "A to Z Garage" and a servant quarter. The said letter also states that the Assessment extract for the year 1985-86 disclosed that the property is assessed prior to 1961-62. A copy of deed of assignment dated 21st September 2000 executed by M/s.Abdullabhai Faizullabhai Pvt.Ltd. in respect of the larger property in favour of Mohamed Yunus A.Gani Navsariwala and others is also placed on record. There is an annexure to the said deed which contains a list of tenants. It is to be noted that the name of Abdul Samad through whom the Respondents are claiming does not appear in the said list. There is nothing on record to prima facie show

that the suit structure is part of the A to Z Auto Garage. The Plaintifs/Respondents have entered the property in 2002. They have not filed any affidavit of any persons carrying on business in the locality for a substantially long time in support of the said contention. There is no reference to the existence of any old structure in the Agreement executed in favour of the Respondents by M/s.Global Marketing.

13. Shri Bharucha has invited my attention to the notice dated 21st October 1991 issued to Abdul Samad of A to Z Garage with a sketch of the offending structure attached to it. The said notice alleges that there is an unauthorised construction of a garage as shown in the sketch. Shri Bharucha, the learned Counsel appearing for the Respondents in Appeal No.1024 of 2003 invited my attention to the sketch of the suit structures on page 41 of the additional compilation filed in the said Appeal and submitted that the sketch forming part of notice dated 21st October 1991 and the sketch at page 41 are more or less identical. The Plaintiffs have come to the Court with a specific case that the present suit structure in respect of which the impugned notice under section 351 is issued was in occupation of Mr.Abdul Samad who was carrying on business under the name and

style of M/s.A to Z Auto Garage which was assessed to the property tax by the Appellant No.1-Corporation and therefore, prima-facie they will have to either show that the said structure has been lawfully constructed after obtaining permission or it was in existence prior to the datum line i.e. 1st April 1962. It appears that Abdul Samad had filed L.C.Suit No.8460 of 1991 for challenging the Notice dated 21st October 1991 and the order dated 27th December 1996 passed by the Deputy Municipal Commissioner on the basis of the said Notice. The documents placed on record in the additional compilation show that initially in the said suit the challenge was only to the notice issued under section 351 dated 21st October 1991 and ad-interim injunction was granted in the Notice of Motion No.6395 of 1991. Subsequently another notice of motion was taken out in the year 1997 by which the order dated 27th December 1996 came to be challenged. The order of the City Civil Court which is at page 89 of the additional compilation of A.O.No.1024/03 shows that the challenge by Abdul Samad in the said suit was to the notice under section 351 dated 21st October 1991 and to the order dated 27th December 1996 passed by the Deputy Municipal Commissioner on the basis of the said notice. The said order shows that on 10th December 1998 the suit filed by

Abdul Samad was dismissed as writ of summons was not served. It is not the case that the said suit was restored.

14. Thus the net result is that even according to the Plaintiffs, the present suit relates to the structure of M/s.A to Z Auto Garage in respect of which notice under section 351 of the said Act of 1888 was issued on 21st October 1991. There is an order passed on 27th December 1996 directing demolition of the said structure of M/s.A to Z Auto Garage. Thus on account of the dismissal of the suit, the order passed under section 351 of the said Act of 1888 holding the structure of A to Z Auto Garage is unauthorised has attained finality. There is no attempt made by any one to challenge the said order or the said earlier notice.

15. As stated earlier the Plaintiffs have claimed specifically in their reply to the notice under section 351 and in the plaint that the structures in their possession are part of the structure of A to Z Auto Garage. Even assuming that the case made out by the Appellant-Corporation regarding the construction of new structure is not accepted, the Plaintiffs are in possession of a part of the structure of A to Z Auto

Garage which is unauthorised and there is no challenge to the order dated 27th December 1996 passed by the Appellant No.1 holding that the structure was unauthorised.

16. In so far as these three Appeals are concerned, the effect of the earlier notice under section 351 of the said Act of 1888 and the order of demolition dated 27th December 1996 is not at all considered by the learned trial Judge. He has also not adverted to the fact that the earlier suit filed in respect of the same structure of A to Z Auto Garage challenging the notice under section 351 of the said Act of 1888 and the order of demolition has been dismissed for want of prosecution. In this view of the matter it is no longer open for the Respondents/Plaintiffs to contend that the structure of A to Z Auto Garage was authorised and legal and therefore the said contention ought to be rejected.

17. It is true that the order passed by the learned trial Judge is a discretionary order. However, if the discretion has been exercised without considering very relevant documents on record which go to the root of the matter, the exercise of such discretion will have to be held as arbitrary. Though the scope of Appeal under

Order XLIII Rule 1(r) of the said Code is limited, if the learned trial Judge has exercised discretion in such arbitrary manner, the order of the learned trial Judge will have to be corrected.

18. The Respondents/Plaintiffs have come into the picture for the first time in the year 2002. Merely because action is not taken by the Appellant No.1-Corporation from the year 1996 cannot enure to the benefit of the said persons who have chosen to acquire the shops without making any enquiry as regards the legality of the structure. In this connection it will be necessary to refer to the decision of the Apex Court reported in (1999) 6 SCC page 464 (M.I.Builders Pvt.Ltd. v/s. Radhey Shyam Sahu & others). In paragraph 73 of the said Judgment the Apex Court has held that no consideration should be shown to the builders or any person when the construction made by them is unauthorised. The Apex Court has held that when the structure is shown to be illegal, discretionary relief cannot be granted, which will have the effect of encouraging and perpetuating illegality. In paragraph 73 the Apex Court held thus:

".....**This Court is numerous decisions has**

held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. **Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished.** There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles." (Emphasis supplied).

Therefore, the irresistible conclusion is that so far as these three Appeals are concerned, the Plaintiffs even according to their own case are claiming to be in possession of a part of the structure which is already held to be illegal in an action under section 351 of the said Act of 1888 which culminated in the order dated 27th December 1996 passed by the Deputy Municipal Commissioner. The due process of law prescribed by section 351 of the said Act of 1888 is complete long back in 1996. Thereafter the impugned notice dated 13th May 2003 was issued and after considering reply and documents relied upon by the Respondents a detailed order of demolition is passed by the Appellant No.2. In view of aforesaid discussion, the Respondents have miserably failed to establish prima facie case.

19. In my view the impugned Judgment and order so far as it relates to the three Appeals is unsustainable and will have to be set aside.

A.O.1027/04.

20. The challenge in the suit subject matter of this Appeal is to the notice under section 351 of the said

Act of 1888 dated 13th May 2003. The allegation in the notice is that there is an unauthorised construction of a structure with brick masonary wall and A.C. sheet roof admeasuring 12.8 m. x 13.40 m. with height of 3.40 m. in Moonim Compound, Opp: Manish Market, Mumai. There is a reply filed to the said notice by the original Plaintiffs through their Advocate. As in the earlier case it is asserted that the structure is situated on land bearing C.S.No.14/1504 of Fort Division, namely Plot Nos.X, XXII and XXIIIA which are re-numbered as Plot Nos.7 to 10. In this case, the Plaintiffs are claiming through M/s.Crescent Gas Supply Agency. It is stated that the structure of M/s.Crescent Gas Supply Agency was assessed by the Appellant No.1-Corporation for Municipal Taxes and reliance is placed on the assessment extract. It is stated in the reply that there are 8 shops in the bigger structure and since the 8 shops have a common roof, the said shops are considered as one structure. It is stated that there was a notice issued under section 351 dated 15th December 1987 in respect of the very structure by the Appellant No.1-Corporation and the said earlier notice was not acted upon. A reliance is placed on the inspection report of the Officers of the Licence Department who visited these structures of M/s.Crescent

Gas Supply Agency. A reliance is also placed on the licence granted to the said Agency under section 394 of the said Act of 1888.

21. Reference will have to be made to the averments made in the plaint. The plaint reproduces the contentions raised in the reply to the notice under section 351. The plaint also reproduces the order passed by the designated Court under the MCOC Act in which assurance is recorded that the Appellant will take action in accordance with the due process of law as enunciated in Sopan Maruti's case.

22. It is stated in the plaint that M/s.Crescent Gas Supply Agency surrendered their tenancy rights in respect of the premises in their possession in favour of the Defendant No.3 M/s.Global Marketing. It is stated that M/s.Crescent Gas Supply Agency was granted licence under section 394 of the said Act of 1888 and the structure was in existence prior to 1961-62. In the plaint it is stated that on 15th December 1987 a notice under section 351 of the said Act of 1888 was issued to M/s.Crescent Gas Supply Agency in respect of the suit structure and no action has been taken by the Appellant No.1-Corporation. The present notice under section 351

is challenged mainly on the ground that the structure of M/s.Crescent Gas Supply Agency was in existence prior to 1961-62 i.e. before the datum line.

23. A reply was filed to the Notice of Motion by the Appellant No.1. In the said reply it is submitted that the name of M/s.Crescent Gas Supply Agency was entered into the assessment record in respect of the open land and a shed used by it as office. The assessment of the shed was made for the first time in the year 1977-78 and the said shed was itself unauthorised. It is stated that by demolishing the said shed, new structures have been erected in respect of which the present notice has been issued.

24. It will be necessary to refer to various documents on record of the trial Court. There are two letters on record issued by the Assistant Assessor and Collector addressed to M/s.S.Raees & Associates. The first letter describes the position of the assessment in the year 1997-98 which shows that there was a shed of Crescent Gas Supply Agency with a mazzanine floor and a portion of the shed was used by Crescent Gas Supply Agency for storing gas cylinders. The same is the description of the property of M/s.Crescent Gas Supply Agency in the

assessment record for the year 2000-01. However, in the Inspection of Assessment Record of 1996-97 name of the said Agency does not find place. I have carefully perused the compilation of documents produced on record. I find that there is nothing in the record to show that the structure/shed of M/s.Crescent Gas Agency was in existence prior to 1961-62. There is a categorical assertion in the reply filed by one Appellant to the Notice of Motion that the shed was assessed for the first time in the year 1977-78 and there is no document produced by the original Plaintiffs to show even primafacie that the shed was in existence even prior to 1977-78. It is to be noted here that reliance is placed on a deed of assignment executed by M/s.Abdullabhai Faizullabhai Pvt.Ltd. dated 21st September 2000 to which a list of tenants in the property is annexed. It shows Crescent Gas Supply Agency as one of the tenants in respect of the premises on the ground floor. The said document has no relevance as it is of the year 2000. It will also be necessary to make reference to one more document on record i.e. letter dated 13th July 1994 sent by the Assistant Engineer, Bombay Central Sub-Division I, Central P.W.D. Bombay-20, addressed to M/s.Abdullabhai Faizullabhai Pvt.Ltd. The subject of the said letter shows that it pertains to the same

larger property. The Assistant Engineer has recorded that after inspection on 28th May 1994 he found that the LPG godown admeasuring 15’ x 30’ and office premises of 10’ x 10’ has been constructed without approval from his office. It submitted that in the year 1987 notice under section 351 of the said Act of 1888 was issued against the said M/s.Crescent Gas Supply Agency and the said notice was not acted upon. The case of the original Plaintiffs is that the structure was in existence from 1961-62 or even prior thereto. The stand taken on oath by the Appellant No.1-Corporation is that M/s.Crescent Gas Supply Agency was in possession of a shed which was assessed for the first time in 1977-78. As against this, there is no material on record produced by the Plaintiffs to show that the shed was assessed at any time prior to 1977-78. The structure of the original Plaintiffs can be protected provided primafacie it is shown that the same is either authorised or protected under one of the policies of the Appellant No.1-Corporation. Unless primafacie evidence was produced by the original Plaintiffs to show that the structure in respect of which the present notice is issued was in existence prior to the datum line adopted by the Appellant No.1-Corporatrion, the Plaintiffs cannot get protection. The earlier notice of the year

1987 is in fact a prima-facie evidence to show that the structure is unauthorised.

25. All these factual aspects are not at all considered by the learned trial Judge. There is no material produced on record by the original Plaintiffs even to prima facie show that the structure in question was erected prior to the datum line i.e. 1st April 1962. I have considered the material in the light of the case made out by the Plaintiffs to the effect that the shops have been created by altering internally the existing structure of M/s.Crescent Gas Supply Agency. It must be noted here that there is no primafacie material on record to show that the present suit structure is the shed of M/s.Crescent Gas Supply Agency. The Respondents have come in the suit structure in the year 2002. They have not filed affidavit of any person in the locality to show that they are in possession of the shed of Crescent Gas Supply Agency and that the said shed was in existence in 1962. Though in the plaint it is stated that M/s.Crescent Gas Supply Agency had surrendered tenancy rights in respect of the said premises to Defendant No.3 M/s.Global Marketing, there is no documents of surrender produced on record. Thus considering the matter from any angle, it is impossible

to come to the conclusion that the original Plaintiffs have proved primafacie case. Therefore, in this case also the original Plaintiffs were not entitled to temporary injunction.

A.O.NO.1028/03.

26. In so far as this appeal is concerned, notice under section 351 is dated 13th May 2003. In the notice it is alleged that there is unauthorised construction of a structure with brick masonary wall, and A.C.sheet roofing admeasruing 12.70 m. x 15.40 m. and height of 4.10 m. and 3.00 m. A reply is filed by the original Plaintiffs through their Advocate. In this reply the Plaintiffs are claiming on the basis of the agreement executed by M/s.Global Marketing in their favour in the year 2002 in respect of stalls/shops. It is contended in the reply that the structure was in existence from the year 1961-62. It is stated that the structure was owned by one Zulfikar of M/s.Masook & Sons. Reference will have to be made to the averments made in the plaint. In the plaint allegation is that M/s.Masook & Sons. surrendered tenancy in respect of the suit structure in favour of the Defendant No.3 and the Defendant No.3 created units/cabins in the structure.

Reliance is placed on a deed of assignment dated 21st September 2000 executed by M/s.Masook & Sons by which it is alleged that the tenancy was surrendered in favour of the Defendant No.3. It is stated that on 21st October 1991 notice under section 351 of the said Act of 1888 was issued by the Appellant No.1-Corporation.

27. A reply is filed on behalf of the Appellant No.1. In the said reply a contention has been raised that the suit structure was not in existence before the datum line and it was assessed in the year 1985-86. A Reference will have to be made to the documents produced by the parties. There is one zerox copy of the agreement dated 10th April 1982 executed by M/s.Abdullabhai Faizullabhai Pvt.Ltd. in favour of Mashook Dost Mohammed. The said agreement is in respect of a small portion of open land for the purpose of storing of wooden planks. It will be necessary to refer to the assessment record produced by the original Plaintiffs. The assessment record for the year 1997-98 shows that there were two godowns by M/s.Masook & Sons and a shed of Zulfikar. The Assessment record of the year 2000-2001 also refers to two godowns of M/s.Masook & Sons.

28. In this case also the Plaintiffs have come out with a case that a notice under section 351 of the Act of 1888 was issued in respect of the suit structure. The Plaintiffs are not claiming that the suit structure has been constructed by obtaining prior permission of the competent authority. Their contention is that the suit structure deserves to be tolerated as it is constructed before the datum line fixed by the Appellant No.1. There is no primafacie evidence to show that the suit structure is a part of the structure/godown of M/s.Masook & sons. Even assuming that it is so, merely because notice of demolition issued in the year 1987 is not acted upon by the Appellant No.1, it will not create any equity in favour of the Plaintiffs. It is to be noted here that even in the agreement executed by Defendant No.3 in favour of the Plaintiffs there is no recital that the units/shops are authorised. There is no recital that the shops/stalls are part of the old structure of M/s.Masook and Sons or of Zulfikar. Assuming that the suit shops/galas are part of the old structure of M/s.Masook and Sons the notice of the year 1987 will primafacie prove that the structure is unauthorised. There is no material produced on record to show that the structure was in existence in the year 1961-62. There is no consideration by the trial Court

of the documents which are produced in the suit out of which the present Appeal arises. In my view, no primafacie case is made out by the Plaintiffs and therefore, the injunction could not have been granted.

A.O.NO.1029/2003.

29. In this case notice under section 351 is dated 13th May 2003 alleging unauthorised construction of ground floor and part first floor structure in brick masonary walls and A.C.Sheet roofing on west side of the Munim Compound abutting to Sara and Sahara Shoppee. A reply is given to the said notice by the original Plaintiffs through their Advocate. In the said reply it is contended that the structure was in possession of one Zulfikar son of Masook Khan, who was carrying on business in the name and style of Masook & Sons. It is stated that the suit structure is in existence prior to the datum line.

30. In the plaint the Plaintiffs have asserted that the structure was in possession of Mr.Zulfikar s/o. Masook Khan and the structure has been acquired by the Defendant No.3 by deed of assignment dated 21st

September 2000. In the affidavit-in-reply filed by the Appellant No.1, it is denied that the structure was in existence prior to the datum line. It is stated that the structure has been assessed much after the datum lime for commercial premises i.e.1st April 1962.

31. Reference will have to be made to the documents which are on record. Reliance is placed on the certificate issued by the Appellant No.1 in July 1997 to M/s.S.Raees & Associates. In the said certificate which is based on Inspection Extract of 1996-97 assessment record, there is a reference to possession of Godown No.2 by Masooq & Sons at item No.3 and 3A. It is pertinent to note here that the name of Mr.Zulfikar is not appearing in the said extract. In assessment record maintained by the Appellant No.1 for the years 1997-98 and 2000-2001 name of Zulfikar appears against Shed No.8 described as office. But it is not described as a structure having ground plus one floor. There is no primafacie evidence on record to show that the suit structure is the same which has been described in the assessment record as a shed held by Zulfikar. Assessment record does not show that the structure of Zulfikar was in existence before 1st April 1962. Therefore, for the reasons which are recorded in respect

of premises involved in Appeal from Order No.1028 of 2003 wherein the Plaintiffs are claiming through M/s.Masook & Sons, in this case also finding will have to be recorded that the Plaintiffs have miserably failed to prove primafacie case by producing primafacie evidence to show that the suit structure was in existence prior to the datum line. It is to be seen here that the notice is in respect of ground plus upper floor and the assessment extract on record does not show existence of the first floor in possession of the said Zulfikar or in the name of M/s.Masook and Sons.

A.O.NO.1030/2003.

32. Here also notice is dated 13th May 2003. It is in respect of an unauthorised construction of ground plus one upper floor with brick masonery wall ladi coba with A.C.sheet roofing. A reply is filed by the Advocate for the Plaintiffs in which it is stated that the structure was in occupation of M/s.New Sangam Transport Company on the same larger property. In this case also, the Plaintiffs are claiming through the Defendant No.3 M/s.Global Marketing. It is pertinent to note here that in the reply there is no reference as to how Defendant No.3 has acquired the premises from M/s.New Sangam

Transport Co. It is alleged that the suit structure is in existence from 1962.

33. In the plaint it is asserted that the structure was in possession of M/s.New Sangam Transport Co. In the plaint it is stated M/s.New Sangam Transport Co. surrendered tenancy by different documents in favour of Defendant No.3. It is asserted that the structure was in existence prior to the datum line.

34. I find that the alleged deed of surrender executed by M/s.New Sangam Transport Co. is not placed on record. In the assessment record of the year 1997-98 as well as of the year 2000-2001 there is reference to a godown of New Sangam Transport Co. with mazzenine floor. A reference will have to be made to letter dated 13th July 1994 written by the Assistant Engineer of the Central Government. It is noted in the said letter that after inspection of 25th August 1994 it was found that Sangam Transport has erected a new structure. In this case also there is no primafacie material to show that the suit structure has any co-relation with the structure of M/s.Sangam Transport Company. There is no primafacie material on record to show that the suit structure was in existence prior to the datum line. In

my view even in this case also no finding could have been recorded as regards existence of primafacie case.

COMMON FEATURES OF ALL THE CASES.

35. There are certain common features of all the cases. In all the cases contention has been raised that the suit structure has been in existence from 1961-62. The suits were filed in September 2003. The Notices of Motion in all these suits are decided in November 2003. Notices under section 351 are of May 2003. The Plaintiffs have not filed affidavits of any independent persons in the locality to show that these structures were old structures belonging to various parties which have been converted into shops/stalls. No effort is made to produce affidavits of concerned firms/individuals who were allegedly holding the suit structures according to the case made out by the original Plaintiffs. In all these cases the Plaintiffs are claiming through the Defendant No.3. It is not their case that before entering into the agreement with the Defendant No.3 M/s.Global Marketing, they have made enquiry as to whether the structures were authorised. This is very relevant as in the Agreements executed by M/s.Global Marketing there are no recitals referring to

conversion of existing old structures into shops/stalls Burden of establishing primafacie case is on the original Plaintiffs. The said burden has not been discharged. In all the cases except one or two there are earlier notices of demolition issued by the Appellant No.1-Corporation admittedly in respect of the same structure alleging that the strcutures are illegal. Notices have either gone unchallenged or the challenge to the notices has failed. The Plaintiffs who have come in the picture in the year 2002 now cannot say that no action is taken earlier by the Municipal Corporation and therefore, now action cannot be taken against them. The Apex Court in the Judgment reported in (1983) 2 S.C.C. 422 (Municipal Corporation of the City of Ahmedabad v/s. Ben Hiraben Manilal) held thus:

> ".....If we keep in mind the purpose of these regulations and objection of these regulations i.e. regulating the building construction in a municipal statute, it appears that it will be anomalous result if it be said that if a building is constructed illegally or in an unauthorised manner, action can only be taken against the person who is doing the unauthorised act or illegal

> act but after the construction of the building is passed over to others, the construction of the building enjoys immunity from any action in respect of the same."

Thus the Apex Court has held that after the illegal construction is passed over to others, the construction of the building cannot enjoy immunity from the action in respect of the same. These are not the cases where the Plaintiffs were claiming that the structures were constructed after obtaining lawful permission. Reliance is only on the policy of the Appellant No.1-Corporation under which unauthorised commercial structures constructed prior to 1st April 1962 have been tolerated. As set out earlier in each individual case the Plaintiffs have failed to produce even primafacie material to indicate that the structures were in existence before the said date.

REASONS BY THE TRIAL COURT.

36. A perusal of the common Judgment and Order delivered by the learned trial Judge shows that all that is said in favour of the Plaintiffs is that they are certain old documents produced by them and they should

be given opportunity to lead evidence. The question was of grant temporary injunction on settled legal principles. Unless a finding was recorded that the Plaintiffs have established primafacie case the injunction could not have been granted. When the findings of primafacie case was required to be recorded, it was necessary for the trial Court to appreciate the documents which are produced on record and to record a primafacie or tentative findings on consideration of the said documents. However, the said exercise was not done by the learned trial Judge. The learned Judge was impressed by the fact that 63 persons were carrying on business. The said persons had entered in the property in 2002. Prima facie, the said persons had entered into transaction with M/s.Global Marketing without taking any precausion which any prudent man would have taken. When prima faice case was not established there was no occasion to go into question of irreparable loss. The leanred trial Judge has exercised discretion by disregarding settled principles of law. Grant of equitable and discretionary relief in such manner requires interference by the Appellate Court.

37. For the reasons which are set out separately in each individual case in the earlier paragraphs and in

view of what has been held by the Apex Court in the case of M.I.Builders (supra), there is no other option but to set aside the impugned Judgments and orders. As held earlier exercise of discretion by the trial Court is not on well settled principles and the impugned Judgment and order is vitiated by non-consideration of the material documents on record. Hence the following order is passed:

i) The impugned Judgment and order is set aside and the Notices of Motion taken out by the original Plaintiffs stand dismissed.

ii) The Appeals are allowed in the above terms with no order as to costs.

iii) At this stage, a request is made by the learned Counsel appearing for the original Plaintiffs that the status-quo as of today be directed to be maintained for a reasonable period, so that the original Plaintiffs can approach the higher Court. The said request is opposed by the learned Counsel appearing

for the Appellants.

iv) There is enormous burden on the Court Stenographers and therefore a copy of the Judgment cannot be made available expeditiously. In the circumstances, the parties are directed to maintain statusquo as of today till 6th May 2005.

vi) Parties to act on authenticated copy of the order.

Judge.